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How the feds grappled with a leak

By Daniel Schorr

For 14 months the Justice Department weighed the possibility of Espionage Act indictments arising from the unauthorized publication of the House Intelligence Committee report. It studied, as potential targets, the source, the intermediary and the publisher. It apparently hoped to test whether *after-the-fact* prosecution would succeed as a deterrent to news leaks where *prior* restraint had failed in the 1971 case of the Pentagon Papers.

In the end, however, unable to get government agencies to agree to release classified documents for trial, the department abandoned its investigation.

This emerges from an internal file on the case recently released in response to privacy and freedom-of-information applications. They provide an unusual insight into the process of grappling with the legal consequences of a news leak, and are digested here as factually as possible.

On Feb. 11, 1976, The Village Voice appeared with almost the entire text of the draft final report which the House Intelligence Committee had approved for release, over the objections of intelligence agencies and President Ford, but which the House had then voted to withhold from publication. Two days later Atty. Gen. Edward Levi asked the Criminal Division to determine "what possible violations of law may have occurred by this disclosure and publication."

On Feb. 17, Asst. Atty. Gen. Richard L. Thornburgh replied in a memorandum that there were "three categories of individuals who may be potentially subject to prosecution" under the Espionage Act:

1. The "congressman or staff member" assumed to be the original source would be subject to the section of the law forbidding transmission of a national defense document to "any person not entitled to receive it." The accused might invoke the protection of the "speech and debate" clause of the Constitution, but could hardly justify as a "legislative act" the release of a report which the House had voted against releasing.

2. The "intermediary" may have violated the section declaring it a felony to receive a national defense document from "any source whatever" when there was reason to quoting me as having acknowledged my role as intermediary. Thornburgh said, "If any criminal action were to be taken against Schorr it would be necessary to obtain the testimony of persons to whom he made such admissions. This would be difficult since it appears that the admissions were made to fellow members of the fourth estate."

3. The publisher of The Village Voice (Clay Felker) may be punishable under the provision applying to anyone in unauthorized possession of a national defense document who "willfully communicates" it to another person "not entitled to receive it." Thornburgh stressed Justice Byron White's opinion in the Pentagon Papers case that he "would have no difficulty in sustaining convictions" of newspapers in cases where he would not impose prior restraint.

The FBI was designated to obtain from intelligence experts an analysis of whether the Pike report contained "presently classified information on which a prosecution could be predicated."

On March 17, FBI Director Clarence Kelley reported on portions of the document which Defense Intelligence considered classified. But the Pentagon advised that "any decision to declassify for purposes of prosecution would have to be made in consultation with other agencies in the intelligence community, and possibly foreign governments."

Thornburgh asked Kelley to tell the Defense Department that there would have to be "definite answers with regard to declassification" before any decision on prosecution, and, furthermore, that intelligence agencies might have to turn over to defense attorneys the "source documents" from which the classified information came.

Then the Justice Department discovered a declassification dilemma of its own. John H. Davitt, chief of internal security, wrote Thornburgh on March 23 that one "item" in the Pike report bore on activities classified secret by the attorney general. This referred to the FBI's "counterintelligence programs," conducted between 1956 and 1971 against foreign and domestic extremists and foreign intelligence agencies. A decision on declassification, said Davitt, would have to be made by the attorney general "after consultations with the White House and/or the Department of State."

An unanticipated hindrance to prosecution arose on March 30 with newspaper reports quoting former CIA Director William E. Colby as stating, to a forum in New Orleans, that "Schorr carried out his obligation to the First Amendment and to himself as a newsman and should not be punished." Recalling that it had been Colby who had written Chairman Otis Pike prohibiting the release of classified information, Davitt advised Thornburgh that his quoted remark would certainly affect any prosecution.

A lull in Justice Department activity ensued while the House Ethics Committee pursued its search for the origin of the leak, culminating on Sept. 15 with my appearance and refusal to disclose my source.

Two days later, the Justice Department started up again. On Sept. 17, Thornburgh wrote CIA Director George Bush, pointing out that he had not yet received an answer on declassification of material for trial. "Unless and until we receive the information we have requested from the interested agencies of government," he said, "we are precluded from taking any further action."

Replying for the CIA on Oct. 17, John D. Morrison Jr., deputy general counsel, said the agency would not decide about declassification until the investigation had reached a point where "CIA can weigh the benefits of possible successful prosecution against damage that may be done by declassifying any particular item." In the next few weeks Defense Intelligence took a similar position, while the State Department said flatly that it would object to disclosing source documents.

On Dec. 3, the CIA transmitted to Justice an analysis of the Pike report identify-

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